In The

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-992

R. R. RAINES, SECRETARY OF CORRECTIONS,
Petitioner,

vs.

JACK L. WRIGHT,
Respondent.

and

R. R. RAINES, SECRETARY OF CORRECTIONS,
Petitioner,

vs.

KENNETH CHILDERS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KANSAS

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Petitioners, Robert R. Raines, Secretary of Corrections of the State of Kansas, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Kansas, entered in this case on July 22, 1977.

OPINIONS BELOW

Respondents filed petitions for writ of habeas corpus in the State District Court of Leavenworth County, Kansas. These petitions were summarily denied in a Memorandum of Decision dated April 11, 1977 (Appendix A). The Court of Appeals of the State of Kansas reversed this decision in an opinion on a consolidated appeal filed July 22, 1977 (Appendix B). A motion for rehearing was denied by the Court of Appeals on August 4, 1977 (Appendix C). A timely petition for review was filed with the Kansas Supreme Court by the petitioners, and an order denying review was entered by that court on September 12, 1977 (Appendix D).

JURISDICTION

The order of the Kansas Supreme Court denying review was filed on September 12, 1977. On the 8th of December, 1977, petitioner applied for and subsequently received an extension of time in which to file a petition for writ of certiorari in this matter to and including January 11th, 1978. This petition has been filed within this extended date. Jurisdiction of the Court is invoked under 28 U.S.C. § 1247(3).

QUESTION PRESENTED

Whether the petitioners, in order to sustain a state correctional policy prohibiting prison inmates from wearing beards against attack as a restriction of the free exercise of religion, must show the policy serves a compelling state interest and that there are no less restrictive means of achieving the intended goals of the regulation, or whether a lesser standard of review is applicable requiring only

that the policy further important penological objectives and not be overly broad?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution, which provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

It also involves the Due Process Clause of the Fourteenth Amendment to the United States Constitution, which provides:

> "[N]or shall any State deprive any person of life, liberty, or property without due process of law . . . ."

It further involves the Kansas State Department Corrections Policy Number 207, promulgated under the authority granted by K.S.A. 1977 Supp. 75-5205, and 75-5207. Policy Number 207 provides:

> "Male inmates, regardless of their admission date, will not be permitted to grow beards . . . ."

STATEMENT OF THE CASE

A. Statement of Facts

The respondents are inmates within Kansas State Penitentiary, Lansing, Kansas under the custody of Secretary of the Kansas Department of Corrections. The Secretary of the Kansas Department of Corrections promulgated under his statutory authority policy no. 207 which

prohibited inmates from growing beards. From the perspective of correctional officials, the institutional interest served by the proscription of facial hair is that of internal order and security within the penal institution. Prison officials contend that in order to responsibly discharge their duties in this regard, they must be well acquainted with the physical appearance and description of inmates. Institutional security demands that certain inmates be prevented from intermingling or from entering particular areas of the institution. If, among a large body of inmates within a penal institution, inmates are allowed to freely modify their appearance through growth of facial hair, this process of identification, will be made more difficult. Also, the no-beard policy further serves institutional security by eliminating the facility of escaped felons, once outside the institution, to rapidly and drastically modify their appearance by the simple expedient of a razor.

Respondents were confined within a separate facility of the institution on protective custody, at their own request. Within this separate facility some protective custody inmates enjoy the privilege of working in the prison laundry. But these positions are limited, so a number of protective custody inmates do not work and therefore do not earn incentive pay. Laundry jobs are considered a privilege, granted at the discretion of prison officials.

At the time respondents became aware of policy no. 207 they were confined on protective custody status and were not working in the prison laundry. Respondents refused to comply with the stated policy for the reason that it conflicted with their professed adherence to the Sikh religion. One tenet of the Sikh dharma admonishes disciples to refrain from cutting any body hair.

As a result of their failure to comply, officials at the penitentiary placed both respondents under the administrative restriction of a segregated exercise period apart from the remainder of protective custody inmates not working.

B. How the Federal Question Arose

This administrative action prompted both respondents to file separate petitions for writ of habeas corpus in the District Court of Leavenworth County (the situs of their confinement) pursuant to K.S.A. 60-1501. Those petitions alleged that the correctional policy prohibiting beards contravened their right to the free exercise of their religion as guaranteed under the First Amendment to the United States Constitution. After examination of the contents of the petitions, the Honorable Frederick N. Stewart, Associate District Judge, District Court of Leavenworth County, concluded that both failed to state a claim upon which relief may be granted and entered an order dismissing the petitions.

Respondents appealed to the Court of Appeals of the State of Kansas. In an opinion dated July 22, the Court of Appeals reversed the district court's dismissal of the petitions, and held that in order for the contested administrative policy to be upheld, the First Amendment of the United States Constitution requires the Department of Corrections to establish that the given correctional policy advances a compelling state interest and that no less restrictive means are available for establishing the intended goals of the policy. The matter was remanded to the District Court for the purposes of conducting an evidentiary hearing in this regard.

A request for rehearing was denied. Also a petition requesting review of the decision by the Kansas Supreme Court was denied.

REASONS FOR GRANTING THE WRIT

I. Federal Court Opinions Interpreting the Appropriate Standard of Review to Apply to Administrative Penal Practices Which Allegedly Impinge First Amendment Rights of Prison Inmates Are in Conflict Resulting in Divergent Opinions Among the Circuits. More Cogent, Recent Authority Tends to Establish That Prison Administrative Practices Should Be Sustained Against a First Amendment Attack If the Practices Further Important Penological Objectives, Are Not Overly Broad, and Have Not Been Affirmatively Shown to Be Unreasonable.

The First Amendment religious freedom guarantees are delineated by two phrases within the text of the amendment, one prohibiting the government from establishing a religion, the other proscribing governmental prohibition of the free exercise of religion.

The latter "free exercise" clause has been held to embrace two separate concepts—the freedom to believe and the freedom to act or practice. The first freedom in its intrinsic nature, is absolute. The unfettered practice of one's religious beliefs, however, has never been considered absolute and is subject to frequent conflict with the broad governmental prerogative to act in the general interest. *Cantwell* v. *Connecticut,* 310 U.S. 296, 303-04 (1940).

When a governmental action, be it legislative or administrative, conflicts with the free exercise of a religious belief, a balancing test has been employed in assessing the validity of the action, weighing the importance of the governmental interest, the nature of the religious in-

terest, and the degree of interference with the religious practice. *Linscott* v. *Millers Falls Co.,* 440 F.2d 14 (C.A. Mass. 1971). As applied, this balancing procedure has evolved a very stringent standard of review, giving rise to the characterization of First Amendment rights as holding a preferred status, *Cantwell* v. *Connecticut, supra.* Generally, in order to sustain a governmental regulation which impinges the free exercise of a sincere religious belief, the governmental interest in the regulation must be shown to be of a particularly compelling nature, something beyond a mere legitimate concern of governmental authority. *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972). This level of review is akin to the "strict scrutiny" analysis under "equal protection" claims involving a "fundamental right" or "invidious discrimination." *Habron* v. *Epstein,* 412 F. Supp. 256 (D. Md. 1976).

In the past, lower federal court decisions considering First Amendment freedom of religion claims within the context of the prison environment have uniformly applied the same high standard of review. For example, in *Brown* v. *Peyton,* 437 F.2d 1228 (4th Cir. 1971) it was held that the practice of state penitentiary officials in refusing a Black Muslim inmate access to certain religious materials and preventing him from meeting with other Black Muslim inmates could be sustained "only upon a convincing showing that paramount state interests so require." *Brown, supra* at 1231.

A variation of this standard applied by some other federal courts in prisoner First Amendment claims throughout the previous decade was the "clear and present" danger test. Under this approach, administrative practices of prison officials restricting religious practices of inmates could be sustained only if the restricted conduct presented a "clear and present danger to the orderly functioning

of the institution." *Banks* v. *Havener,* 234 F.Supp. 27, 30 (D. Va. 1964).

In the past, the assertion of constitutional rights of prisoners within the federal courts was limited. Most inmates' constitutional claims were dismissed through wide deference to the administrative discretion granted prison officials in dealing with those convicted of crimes. This "hands-off" doctrine recognized the intractable difficulties with administering the internal order and security of a large penal institution and the peculiar expertise of prison officials in this regard. It also implicitly supported the theory that once convicted through due process of law, a prisoner forfeits many of his constitutional guarantees of liberty and is subject to reasonable demands of the prison regimen.

This official policy of deference was revised in the previous decade by a number of decisions liberally interpreting 42 U.S.C. § 1983 as not requiring any exhaustion of state remedies. *McNeese* v. *Board of Education,* 373 U.S. 668 (1963), in contradistinction to federal review of state convictions through *habeas corpus,* 42 U.S.C. § 2254, which does require an exhaustion of state remedies. Thus the prisoner-litigant under § 1983 may go directly to federal court, bypass any state administrative or judicial remedies, and contest the conditions of his confinement in a state penitentiary. This policy has prompted a flood of prisoner litigation throughout the '60's and '70's. Statistics of the Administrative Office of the United States Courts indicate that in the period from June 30, 1972 to June 30, 1975 the number of state prisoner civil rights suits in the federal system has increased from 3,348 to 6,128. These numbers continue to increase though not as drastically in the recent two years. Tentative Report No. 2, Recommended Procedures for Handling Prisoner

Civil Rights Cases in the Federal Courts, Federal Judicial Center (1977).

This proliferation of prisoner civil rights litigation has heralded an unprecedented era of development and refinement of the law in its application to the constitutional review of state correctional systems. This initially precipitated an expansion of the role of the federal judiciary and scope of constitutional rights retained by prison inmates, sounding the death knell of the "hands-off" doctrine. *Johnson* v. *Avery,* 393 U.S. 483 (1969); *Collins* v. *Schoonfield,* 344 F.Supp. 257 (D. Md. 1972); *Nimo* v. *Simpson,* 370 F.Supp. 103 (E.D. Va. 1971). However, recent trends in federal decisions indicate that the federal judiciary is taking pause and reconsidering its role and that of the Constitution in prisoner conditions-of-confinement cases. *Meachum* v. *Fano,* 427 U.S. 215 (1976); *Jones* v. *North Carolina Prisoners' Labor Union, Inc.,* 97 S. Ct. 2532 (1977). These continuing refinements in the constitutional law as applied to conditions of prison confinement indicate a contraction in the role of the federal courts and U.S. Constitution.

In the area of prisoner First Amendment actions, the continuing application of the *Brown* "compelling state interest" standard of review has been brought into serious question. Several recent Supreme Court decisions provide clear evidence of the evolvement of a lesser standard of review.

In *Procunier* v. *Martinez,* 416 U.S. 396 (1974), prison inmates brought a class action contesting the mail censorship regulations of the California Department of Corrections as violative of their First Amendment rights. In assessing the validity of the regulation, this court emphasized that the legitimate interests of order and security of penal institutions may justify the imposition of restric-

tions of First Amendment rights. Though holding the contested regulation invalid, this court indicated that the appropriate standard of review should conform to the following:

> "First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression . . . . Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved." 417 U.S. at 413.

That opinion further noted:

> "[t]he interest of prisoners and their correspondents in uncensored communication by letter, grounded as it is in the First Amendment, is plainly a 'liberty interest' within the meaning of the Fourteenth Amendment even though qualified of necessity by the circumstance of imprisonment. As such, it is protected from arbitrary governmental invasion." 416 U.S. at 418.

In a subsequent case, *Pell* v. *Procunier*, 417 U.S. 817 (1974), prison inmates contested a state regulation prohibiting face-to-face interviews between representatives of the news media and individual inmates. In sustaining the regulation against attack as a violation of the First Amendment, the court found the legitimate governmental interest it indicated might be sufficient in *Martinez*.

> "In a number of contexts we have held that reasonable time, place and manner regulations [of communicative activity] may be necessary to further significant governmental interest and are permitted [citations omitted] . . . the 'normal activity' to which a prison is committed—the involuntary confinement and isolation of large numbers of people, some of

> whom have demonstrated a capacity for violence—necessarily requires that considerable attention be devoted to security . . . [W]hen the issue involves a regulation limiting one of several means of communication by an inmate, the institutional objectives furthered by that regulation and the measure of judicial deference owed to corrections officials in their attempt to serve those interests are relevant in gauging the validity of the regulation." 417 U.S. at 826-827.

Martinez and *Pell* have subtly altered the demanding First Amendment standard of review required under *Brown* within the context of the prison environment. The standard enunciated in these cases requires only that the state regulation further substantial or important governmental interests and not be overly broad. *Procunier* v. *Martinez, supra* at 413. *Martinez* and *Pell* also imply that First Amendment rights are qualified by circumstances of confinement within a prison, and intimates, where the asserted institutional interest is internal order, discipline, and institutional security, such rights are protected only from arbitrary governmental invasion. 416 U.S. at 418.

More recently, this previous spring, in *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 97 S. Ct. 2532 (1977) the "hands-off" doctrine appears to have reappeared. That suit was brought by state prison inmates contesting the prison policy of allowing inmates to join a prisoners' labor union, but prohibiting inmate solicitation and group activity by the union. A federal district court in North Carolina held the policy violated the First Amendment. That court held that the defendants failed to establish in their proof that the purported institutional interests advanced by the policy (internal order, discipline, and security) were necessarily served. The Supreme Court reversed.

The analysis of the *Jones* decision afforded great deference to the discretion of correctional officials and their beliefs as to the harms to be expected from prohibited activities. Absent an affirmative showing that such beliefs were unreasonable by those asserting the constitutional violation, the court refused to overturn this discretion in the face of First Amendment attack.

The opinion also strongly indicated that First Amendment rights of prisoners are to be analyzed along different rules, and must give way to legitimate penological objectives:

> "The invocation of the First Amendment, whether the asserted rights are speech or associational, does not change this analysis. In a prison context, an inmate does not retain those First Amendment rights that are 'inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.'" [Citations omitted.] 91 S. Ct. at 2540.

In shifting the burden of proof, and emphasizing that First Amendment guarantees might be diminished by prison confinement, the *Jones* decision further weakens the standard of review in prisoner First Amendment claims as applied in *Martinez*.

Admittedly, the court indicated in *Jones* that First Amendment speech rights were barely implicated, but in the above quoted passage it emphasized the unvarying application of the *Jones* analysis "whether the asserted rights are speech or associational . . . ." 97 S. Ct. 2540. In light of this distinction, the application of *Jones* in the context of the First Amendment's "free exercise" clause invites further clarification by this Court.

Lower federal court decisions determining the validity of inmate claims under the free exercise clause in the

face of conflicting prison administrative practices, have in a variety of contexts demonstrated this uncertainty as to the appropriate standard of review. Two areas particularly demonstrating this divergence of lower court authority are those of religious restrictions regarding diet and personal appearance of inmates.

The issue of religious diets has been raised by both Black Muslims and Jewish inmates claiming First Amendment conflict by the failure of prison officials to provide, at least to a limited extent, pork free diets to such inmates. A Fifth Circuit opinion affirmed summary dismissal of such a claim lodged by Black Muslim inmates incarcerated within a federal penitentiary in Atlanta. *Walker* v. *Blackwell*, 411 F.2d 23, 26 (5th Cir. 1969). However, a District of Columbia Circuit opinion reversed a summary dismissal of a similar claim, terming the inmates' claim "essentially a plea for a modest degree of deference to their religious obligations." *Barnett* v. *Rodgers*, 410 F.2d 995, 1001 (D.C. Cir. 1969). Although the court did not expressly find a First Amendment violation, it did feel further findings of fact were necessary. Similarly, the Fourth Circuit reversed summary dismissal of a comparable claim, remanding the case for a hearing to determine "whether there is adequate nourishment in the pork-free foods currently available to the prison . . . whether the state can establish an adequate interest for not providing some satisfactory or alternative diet."

Also, three recent federal opinions have dealt with requests by Orthodox Jewish prisoners for kosher diets. Two of these opinions dismissed such claims as imposing too great a burden on prison officials, and disruptive of internal order by allowing special privileges to a select group. *United States* v. *Huss*, 394 F.Supp. 752 (S.D. N.Y. 1975), *vacated for lack of jurisdiction*, 520 F.2d 598 (2d

Cir. 1975). *United States* v. *Shilan*, 396 F.Supp. 1204 (E.D. N.Y. 1975). However, the authority of *Huss* has been nullified by its vacation on jurisdictional grounds, and the continuing validity of *Shilan* has been questioned by a subsequent Second Circuit opinion expressly holding that the constitution required prison officials to make some acceptable alternative diet available to Jewish prisoners. *United States* v. *Kahane*, 527 F.2d 492 (2d Cir. 1975).

The other issue fermenting a good deal of controversy in the application of the First Amendment is one presented by the present case, the right of prison officials to control appearance despite conflict with the certain religious beliefs.

A number of prior cases have established that an inmate's right to freely practice his religion does not include the right to disrupt internal prison security and order through the wearing of beards. In such cases, the courts have recognized that reasonable grooming regulations of uniform application further important governmental interests by facilitating the ready identification of inmates so vital to the maintenance of security within a penal institution.

In *Brown* v. *Wainwright*, 419 F.2d 1377 (5th Cir. 1970), a state prisoner challenged the trial court's dismissal without an evidentiary hearing of his petition contending that a prison regulation requiring him to be clean-shaven violated his right to religious liberty under the Constitution. Rejecting the petitioner's claim, the Court observed that the need for personal identification of inmates within a penal institution was an important state interest which overrode any interest of an inmate in wearing a beard in pursuit of his religious beliefs.

This case was followed in *Brooks* v. *Wainwright*, 428 F.2d 652 (5th Cir. 1970) wherein a state prisoner contended that the teachings of the Old Testament as expressed in the Books of Leviticus and Numbers prohibited him from complying with a prison rule requiring inmates to be clean-shaven. In affirming the dismissal by the district court, the court observed:

> "The reasons given in *Brown* for rejecting the prisoner's claim that growing his hair was an exercise of his religion, and the reasons for rejecting other constitutional claims of prisoners, are that where the state regulation is neither unreasonable nor arbitrary, the courts will not interfere with the administrative functions of state prisons. Here as in *Brown*, the haircut and shave regulations promote 'cleanliness and . . . personal identification, so that, regardless of the source of the religious belief, the state has not enforced an unreasonable and arbitrary regulation.'" 428 F.2d at 1377.

This decision was recently reaffirmed in *Hill* v. *Estelle*, 537 F.2d 214 (5th Cir. 1976).

A similar rationale was utilized in *Williams* v. *Batton*, 342 F.Supp. 1110 (E.D. N.C. 1972) in negating a religious challenge to a prison grooming regulation which prohibited beards, mustaches, and long hair. Observing that obvious intra-prison identification problems would be presented were inmates allowed to modify their appearance through the growing of facial hair, the court held that no First Amendment right of the petition was infringed by the regulation and sustained the defendant's motion to dismiss.

Yet another decision rejecting the claim proffered herein by the respondent is that of *Winsby* v. *Walsh*, 321 F.Supp. 523 (C.D. Cal. 1971). Therein, a federal prisoner claimed a religious right to determine the length of his hair and to wear a beard within the institution and sought

his release from segregated confinement. In examining the validity of the regulation, the court employed the same analytical framework as was articulated by the Kansas Supreme Court in *LeVier* v. *State,* 209 Kan. 442, 497 P.2d 268 (1972), *i.e.,* whether the prison policy was arbitrary and capricious and not founded upon a valid penological objective. Finding that the regulation furthered an important governmental interest in institutional security by permitting ready identification of inmates, the court thus characterized the problems that would be presented by granting the prisoner an exemption from the policy:

> "For some of those men [prisoners] to have changing lengths of hair and beards in varying styles and lengths imposes a monstrous identification problem, . . . There can be little doubt that identification of a large number of bearded men is more difficult than the ability to quickly recognize facial features." 321 F.Supp. at 526.

Based upon these considerations, the court sustained the validity of the regulation against the First Amendment challenge. Other decisions upholding similar prison regulations in the face of attacks premised upon the First Amendment's free exercise clause include *Rinehart* v. *Brewer,* 360 F.Supp. 105 (S.D. Ia. 1973), *aff'd,* 491 F.2d 705 (8th Cir. 1974) and *United States ex rel. Goings* v. *Aaron,* 350 F.Supp. 1 (D. Minn. 1972). For more recent authority upholding prison grooming regulations against constitutional challenges see *Peo* v. *Werner,* 386 F.Supp. 1014 (M.D. Pa. 1974) (three-judge court); *Collins* v. *Haga,* 373 F.Supp. 923 (W.D. Va. 1974); *Hill* v. *Estelle,* 537 F.2d 214 (5th Cir. 1976).

Other courts, however, applying different standards have found hair and beard regulations objectionable on

First Amendment grounds. The Eighth Circuit invalidated a prison regulation regarding hair length of inmates holding that the apprehension of prison officials prompting the regulation was not well-founded and did not justify the invasion of First Amendment rights of an American Indian whose native religion prescribed unshorn hair. *Teterud* v. *Burns,* 522 F.2d 357 (8th Cir. 1975). Similarly, Sunni Muslim inmates obtained an injunction against a correctional policy prohibiting beards. The court there found the institutional interest in the identification of inmates did not justify the restriction placed on the religious practice. *Monroe* v. *Bombard,* 422 F.Supp. 211 (S.D. N.Y. 1976). New York has subsequently modified its no-beard policy. For a similar result in regard to hair regulations see *Crowe* v. *Erickson,* unreported decision summarized in 17 Crim. L. Rptr. 2093 (D. S.D., April 4, 1975).

As can be seen, the area of First Amendment rights, prison inmates, and the "free exercise" clause is in need of clarification. Varying lower court decisions have confused the issue, and left substantial doubt as to the appropriate application and scope of the *Jones* and *Martinez* decisions.

It should be noted that a number of previous cases reaching the Supreme Court involving prison inmates asserting rights based on the "free exercise" clause of the First Amendment, involved the validity of administrative practices motivated directly by the desire to suppress a particular form of religious expression. *Cooper* v. *Pato,* 378 U.S. 546 (1964) (per curiam); *Cruz* v. *Beto,* 405 U.S. 319 (1972) (per curiam). Such practices are patently discriminatory against a particular religion and are distinguishable from the situation, as here, where the restriction on the "free exercise" is a result of incidental conflict with a regulation justified on other legitimate grounds.

A number of ancillary issues are presented by the assertion of First Amendment rights under the "free exercise" clause, many of which appropriately are questions of fact. In order to invoke the First Amendment the asserted practice must be at the behest of religious and not merely personal or philosophical values, *Wisconsin* v. *Yoder, supra,* pp. 215-16, a delicate distinction at times difficult to draw. Also, the religion forming the basis of the practice must be a legitimate religion, again a viable distinction, but one eluding precise expression. *Thierault* v. *Carlson,* 339 F.Supp. 375 (N.D. Ga. 1972). Also, those asserting the First Amendment rights in this regard must be sincere adherents of this purported religion. *United States* v. *Ballard,* 332 U.S. 78 (1944). None of these collateral matters are in issue here.

Equally not in issue is the obligation of the state to provide facilities or a meaningful opportunity to enable inmates to exercise their Sikh religion. See *Remmers* v. *Brewer,* 361 F.Supp. 537 (S.D. Iowa 1973), *aff'd,* 494 F.2d 1277 (8th Cir.) (per curiam), *cert. denied,* 419 U.S. 1012 (1974). *Pitts* v. *Knowles,* 339 F.Supp. 1183 (W.D. Wisc. 1972), *aff'd,* 478 F.2d 1405 (7th Cir. 1973). What is in issue is the single, narrow, legal question of the appropriate standard of review to apply when a state prison administrative regulation advancing otherwise legitimate penological objectives incidentally conflicts with the free exercise of an inmate's purported religion. This petition affords an ideal opportunity for the court to clarify the scope of its recent decision in *Jones,* and resolve existing doubts as to the standard of reliew applied in prisoner free-exercise-of-religion claims. The issue is presented clearly and directly, since the record is void of any disputed facts and therefore entangling ancillary issues.

II. This Matter Is of Substantial Importance, in That the Confusion As to the Appropriate Standard of Review Applied in First Amendment Claims Within the Prison Environment Adversely Affects the Already Cumbersome and Overwhelming Burden of Prison Officials in Maintaining the Internal Order and Security of Our Penal Institutions.

In *Procunier* v. *Martinez, supra* at 404-05, this court remarked:

> "Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. Suffice it to say that the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill-equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism."

Confusion in federal judicial authority in the area of First Amendment and freedom of religion rights as applied to prisoners has cast serious doubts on the continued viability of a number of traditional administrative practices of state and federal correctional institutions. This uncertainty places such practices in a state of limbo, and

worse, fails to provide authoritative guidance as to acceptable alternatives. The nature of the task before correctional officials is burdensome enough without having to deal with this legal uncertainty.

Different standards in different districts, the modification of some state policy in response to adverse legal authority, and general confusion has further encouraged already litigious inmates to assert real or imagined constitutional rights in the hopes of wreaking further havoc on the institution and its policies which have inconvenienced them. To the extent these matters are capable of clarification, a clear pronouncement by this Court on the legal issue presented would help stem the rising tide of litigation in this general area.

CONCLUSION

Petitioner respectfully prays the Supreme Court to grant this petition for the purposes of (1) clarifying the meaning of this Court's decision in *Jones* v. *North Carolina Prisoners' Labor Union, Inc., supra; Pell* v. *Procunier, supra* and *Procunier* v. *Martinez, supra,* (2) settling disputes as to the appropriate standards of review to apply in prisoner, First Amendment freedom of religion claims, and (3) providing guidance to prison officials as to appropriate constitutional parameters to consider in formulating institutional policy.

Respectfully submitted,

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APPENDIX A

IN THE
DISTRICT COURT OF LEAVENWORTH COUNTY,
KANSAS

No. 77-C-238

JACK L. WRIGHT,
Plaintiff,

vs.

R. R. RAINES, et al.,
Defendants.

MEMORANDUM OF DECISION

From a full and careful consideration of all of the relevant evidence presented, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiff herein, an inmate at Kansas State Penitentiary, asks for a permanent injunction to restrain defendants, administrators and officers at Kansas State Penitentiary, from restricting, without a hearing, certain of his privileges as a result of his refusal to abide by institutional shaving regulations.

2. Said regulations have been challenged by this plaintiff in *Wright* v. *Oliver,* Leavenworth County District Court Number 2002HC, and were upheld by this Court.

3. The restrictions imposed by defendants at the present time consist of a segregated exercise period and the denial of incentive pay.

4. The issues raised in this case involve the conditions of confinement of an inmate of a state institution.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the subject matter and of the parties to this action.

2. Injunction is an equitable remedy and as such lies within the discretion of the Court.

3. Plaintiff is himself guilty of misconduct in respect to the matter in controversy and as such does not come into Court with "clean hands."

4. The injury complained of is adequately remediable at law through an action for money damages and is more properly cognizable under Habeas Corpus procedures.

5. Plaintiff's petition for a permanent injunction should be denied.

6. The costs of this action should be taxed against the plaintiff.

7. The judgment of this Court should become effective upon the filing of a journal entry which defendants' attorney is requested to prepare.

Dated this 11th day of April, 1977.

/s/ Frederick N. Stewart
Frederick N. Stewart
Associate District Judge

APPENDIX B

IN THE
COURT OF APPEALS OF THE STATE OF KANSAS

No. 48,911

JACK L. WRIGHT,
Appellant,

v.

Mr. R. R. RAINES, Secretary of Corrections, Mr. K. G. OLIVER, Director of Kansas State Penitentiary, LT. K. LYNCH, *et al.,*
Appellees.

No. 48,992

KENNETH CHILDERS,
Appellant,

v.

R. R. RAINES, Secretary of Corrections, K. G. OLIVER, Director of Kansas State Penitentiary, LT. KENNETH LYNCH, *et al.,*
Appellees.

SYLLABUS BY THE COURT

1. An inmate confined in a penal institution retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law. (Following *Levier* v. *State,* 209 Kan. 442, Syl. 1, 497 P. 2d 265.)

2. The rights of an inmate include entitlement to adequate food, light, clothing, medical care and treatment, sanitary facilities, reasonable opportunity for physical exercise and protection against physical or psychological abuse

or unnecessary indignity. (Following *Levier* v. *State*, supra, Syl. 2.)

3. Habeas corpus provides an appropriate remedy for inquiry into mistreatment of a continuing or probably continuing nature alleged by an inmate of a penal institution. (Following *Levier* v. *State*, supra, Syl. 3.)

4. Prison officials as executive officers of the state are charged with the control and administration of the penal institutions of the state and as such are vested with wide discretion in the discharge of their duties. That discretion should not be interfered with by the courts in the absence of abuse or unless exercised unlawfully, arbitrarily or capriciously. (Following *Levier* v. *State*, supra, Syl. 4.)

5. Where a claim is made by a prisoner professing a legitimate belief in an established religion that prohibits the cutting of hair, a hearing must be held to determine if the state's purpose in requiring beards to be cut outweighs the claimed religious right.

6. Only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.

Appeals from Leavenworth district court; FREDERICK N. STEWART, judge. Opinion filed July 22, 1977. Reversed and remanded.

Michael F. Willcott, of Leavenworth, for the appellant, Jack L. Wright.

William E. Pray, of Leavenworth, for the appellant, Kenneth Childers.

Roger M. Theis, assistant attorney general, and *Curt T. Schneider*, attorney general, for the appellees.

Before HARMAN, C.J., FOTH and SPENCER, JJ.

SPENCER, J.:

Appellants are prisoners at the Kansas State Penitentiary at Lansing and each has appealed from an order of the district court dismissing his petition for a writ of habeas corpus under the provisions of K.S.A. 60-1501, *et seq.*

The issues here involved are identical and, although dealt with separately in the trial court and docketed separately in this court, we deem it appropriate to consolidate the appeals for this opinion. Counsel for each petitioner has indicated his agreement to our doing so.

We have been furnished Department of Corrections Administrative Procedure 207, "Standard of Cleanliness to be Observed/Hair Standards for Male Inmates," which provides in part:

"2. The Department's hair standards for male inmates, effective January 15, 1977, are:

"a. Upon admission to the custody of the Secretary of Corrections, or return for parole violation, male inmates' hair will be cut to approximately one and one-half (1½) inches in length; they will be clean shaven of beards and mustaches. These regulations apply to inmates received directly at the Reception and Diagnostic Center and to those who are received at the other adult male institutions. Mug photos for identification purposes will be taken *before* and *after* the admission haircut, within five (5) days after being received.

"b. Male inmates, regardless of their admission date, will not be permitted to grow sideburns below the bottom of the ear and will not be permitted to grow beards.

"c. Male inmates, regardless of their admission date, are permitted to grow mustaches, not to extend beyond the outer corners of the mouth."

Petitioners allege that respondents-appellees' attempts to enforce the policy prohibiting the wearing of beards is in violation of their First Amendment rights in that each is a member of the Sikh religion, among the tenets of which is the prohibition of cutting hair from the body.

Both petitions are handwritten, *pro se*, and entitled "Petition For A Writ Of Habeas Corpus." The Wright petition was filed March 1, 1977; the Childers petition was filed March 17, 1977.

The Wright petition alleges that on or about January 28, 1977, Lt. Kenneth Lynch, officer in charge of the Adjustment and Training Building at the Kansas State Penitentiary, informed Wright that he (Wright) must shave off his beard. Wright informed Lt. Lynch that his religious beliefs prohibited him from doing so. On January 31, 1977, Wright was denied all "privileges" because of his refusal to shave. The petition also alleges that all administrative remedies have been exhausted.

The Childers petition alleges that on or about January 25, 1977, Childers was requested by Lt. Lynch to shave his beard; that Childers informed Lt. Lynch that he could not comply because of his religious beliefs; but thereafter, because of threats of loss of good time and out of ignorance of his constitutional rights, Childers did comply and did shave. On February 1, 1977, Childers was transferred to the Larned State Hospital where he was allegedly beaten and sustained injuries. Upon his return to Lansing on February 12, 1977, he was allowed to refrain from shaving in order that the cuts he had received in the beating could

heal. However, on March 11, 1977, Lt. Lynch informed Childers that he must shave his beard, to which Childers again replied that his religion would not permit him to do so. Having in the interim been informed of his constitutional rights, Childers did not this time comply with the order. He was subsequently denied all "privileges." The petition also alleges that all administrative remedies have been exhausted.

We make note here of information furnished the court upon oral argument to the effect that Wright entered the penitentiary with his beard and presumably his religion; and that Childers, who perhaps was a prison convert, developed his beard while in confinement.

Each petition was denied summarily on the day it was filed. The orders of dismissal are identical and read as follows:

"MEMORANDUM AND ORDER

"Petitioner has filed in the above-captioned case a petition for the issuance of a writ of habeas corpus.

"Petitioner alleges that he is being denied the privilege of wearing a beard and other evidence of his status as a member of the SIKH religion in violation of his constitutional rights in contravention of institutional regulations.

"This Court concludes that the petition fails to state a claim upon which relief can be granted in a habeas corpus proceeding and that a writ should not be issued.

"IT IS, THEREFORE, ORDERED that the petition for a writ of habeas corpus filed herein be denied and that this action be, and the same is hereby, dismissed."

The designated points on appeal in each case are substantially the same and, in the final analysis, the issue here is whether in the absence of responsive pleading or an evidentiary hearing, the trial court may properly dismiss the petitions as failing "to state a claim upon which relief can be granted in a habeas corpus proceeding. . . ."

Bearing in mind that petitioners claim a violation of their First Amendment rights that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .," as made applicable to the states by the Fourteenth Amendment to the Constitution, we consider first whether in fact we are dealing with an established religion.

Our very brief and limited research in this respect, taken from The New Schaff-Herzog Encyclopedia of Religious Knowledge, Vol. 10, p. 408, *et seq.*, reveals that "Sikh" is a term applied to a religious group concentrated in northwest India. The term meaning "disciple" is the correlative of guru "teacher." The religion was founded and developed by a series of ten gurus, who in turn trace the beginnings of their faith to one Kabir, circa 1400 A.D. The first guru, Nanak, was active circa 1500 A.D. The principal book of the Sikhs is the Adi Granth or Granth Sahib. The religion is sometimes said to be an attempt to reconcile Hinduism, Buddhism, and Islam, although it is generally recognized to be a Hindu sect.

The history of the Sikhs is obscure after 1708 (the death of the last of the ten gurus). After 1800 they gradually took political and military control of the Punjab and fought with the British until 1848. Following the victory of the British, many of the Sikhs entered the British Army while in India.

From Buddhism the faith takes as one of its tenets belief in Nirvana. The essentials of Sikh practice are abstention from idolatry, wine and tobacco; observance of the caste system is prohibited; the duty to earn one's living is expressed. True Sikhs are distinguished by the wearing of five articles—long hair, comb, sword, white clothing, and steel bracelet. From a publication originating at the Sikh Dharma Brotherhood headquarters at Los Angeles, California, furnished us by counsel for the appellants, we learn that one of the qualifications of a Sikh is as follows:

> "C. He shall keep his form in the simple existence as God made him, thereby not removing hairs and keeping them long, intact and natural.
>
> "1. The man shall tie his hair in a Rishi knot on the crown of his head to be covered by a cotton cloth known as a turban whenever in public. He will be obliged to keep a dastar (small turban) when he is without his turban. In those situations which require it, he may wear a steel mail over his dastar, over which a turban is to be tied.
>
> "2. The woman shall wear her hair on the top of her head and keep it covered with a turban or chuni when in public."

From evidence made available to us at this time, we must conclude that the Sikh Dharma, referred to in this opinion as "Sikh," is an established and recognized religion to which the petitioners may subscribe.

At this point, we deem it well to make note of the recent decision of the United States Supreme Court in the case of *Jones* v. *North Carolina Prisoners' Union,* ..... U.S. ....., ... L. Ed. 2d ....., ... S. Ct. ..... (No. 75-1874 decided June 23, 1977). In that case, Justice Rehnquist

prefaced his opinion by reference to certain peculiar and restrictive circumstances of penal confinement as follows:

> ". . . [T]his Court has long recognized that '[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.' . . . The fact of confinement and the needs of the penal institution impose limitations on constitutional rights, including those derived from the First Amendment, which are implicit in incarceration. We noted in *Pell* v. *Procunier*, [417 U.S. 817 (1974)] at 822, that
>
> > '[a] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. Thus, challenges to prison restrictions that are asserted to inhibit First Amendment interests must be analyzed in terms of the legitimate policies and goals of the corrections system, to whose custody and care the prisoner has been committed in accordance with due process of law.'
>
> . . . ." (p. .....)

The case of *Levier* v. *State*, 209 Kan. 442, 497 P. 2d 265, involved allegations in habeas corpus petitions of mistreatment of prisoners held in the A & T Building at Lansing. Included were allegations of denial of medical treatment, lack of exercise or work facilities, and injuries inflicted by guards. In an opinion prepared by then Commissioner Harman, now Chief Judge of this court, certain principles of law were set forth as follows:

> "An inmate confined in a penal institution retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law." (Syl. 1.)
>
> "The rights of an inmate include entitlement to adequate food, light, clothing, medical care and treatment, sanitary facilities, reasonable opportunity for physical exercise and protection against physical or psychological abuse or unnecessary indignity." (Syl. 2.)
>
> "Habeas corpus provides an appropriate remedy for inquiry into mistreatment of a continuing or probably continuing nature alleged by an inmate of a penal institution." (Syl. 3.)

It was there cautioned, however, that:

> "Prison officials as executive officers of the state are charged with the control and administration of the penal institutions of the state and as such are vested with wide discretion in the discharge of their duties. That discretion should not be interfered with by the courts in the absence of abuse or unless exercised unlawfully, arbitrarily or capriciously." (Syl. 4.)

It was there held that, for reasons stated in the opinion, the judgment summarily denying relief and habeas corpus be reversed with directions to appoint counsel for petitioners and conduct evidentiary hearings upon issues joined. We again note that the petitions in these consolidated cases were summarily dismissed on the dates of the filing of those petitions and note further that counsel for petitioners were not appointed except for the purposes of the appeals.

In the present case it appears that the deprivations alleged to be the result of the petitioners' insistence on adhering to their religious beliefs will be of a "continuous or probably continuing nature." Such was not the case in

Breier v. *Raines*, 221 Kan. 439, 559 P. 2d 813, which affirmed a summary dismissal of a habeas corpus petition based upon a sexual assault by another inmate and events flowing therefrom. These petitions in effect allege an unlawful exercise of discretion by the prison officials in their control of the prison and the inmates in that the penalties visited upon the petitioners are in violation of their First Amendment right of religious freedom. Thus, the case is not one which on its face involves purely a matter within the discretion of the prison authorities.

The discretion of prison officials in matters of internal management of the prison, "unless clearly arbitrary or shocking to the conscience," was reemphasized in the recent case of *Foster* v. *Maynard*, 222 Kan. ....., Syl. 1, ... P. 2d ..... (No. 48,683 filed June 11,1977), which involved claims of denial of equal protection by inmates housed at the A & T Building at Lansing. There, the supreme court affirmed a denial of relief after an evidentiary hearing.

The free exercise of religion is a protected right (U.S. Const. amend. I; Kan. Const., Bill of Rights Sec. 7). The U.S. Supreme Court has recognized that prisoners retain "substantial religious freedom under the First and Fourteenth Amendments." (*Wolff* v. *McDonnell*, 418 U.S. 539, 556, 41 L. Ed. 2d 935, 94 S. Ct. 2963 [1974].) In this case, the petitioners argue that it was error for the district court to dismiss their petitions, alleging punishment by means of denial of all privileges due to their adherence to their religious beliefs, without responsive pleading or an evidentiary hearing. The state argues that the challenged prison regulation requiring the inmates to be clean shaven is reasonable and justified in itself and that no hearing was necessary.

It appears from those cases cited in appellee's brief that the 5th Circuit Court of Appeals has held that petitions

challenging shaving regulations on religious grounds may be summarily dismissed without hearing. *Brown* v. *Wainwright*, 419 F. 2d 1376 (5th Cir. 1970); *Brooks* v. *Wainwright*, 428 F. 2d 652 (5th Cir. 1970); *Hill* v. *Estelle*, 537 F. 2d 214 (5th Cir. 1976). On the other hand, the 2d Circuit has specifically held that in cases where a claim is made by a prisoner professing a legitimate belief in an established religion that prohibits the cutting of hair, a hearing must be held to determine if the state's purpose in requiring beards to be cut outweighs the claimed religious right. *Burgin* v. *Henderson*, 536 F. 2d 501 (2d Cir. 1976). *Burgin* distinguished *Brooks* and *Brown* as involving "somewhat idiosyncratic claims that beards had religious significance. . . ." (536 F. 2d at 503 n. 4.) In that case, it was said:

> ". . . It may well be that the state's interest in hygiene and identification of inmates outweighs the prisoner's interest in growing a beard as required by his religion, but there is nothing in the record now to show that. As we pointed out in *Sostre* v. *Preiser* [519 F. 2d 763 (2d Cir. 1975)] at 764:
>
> > "But even if the institutional purpose is legitimate and substantial, 'that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' . . .
>
> At the very least, a record must be made as to what the no-beard rule is; how it is applied; whether any beards are allowed; whether, as plaintiffs allege, there is no hygienic problem; and whether the need for identification requires total prohibition of beards, rather than some narrower limitation." (536 F. 2d at 504.)

The case of *Kennedy* v. *Meacham*, 540 F. 2d 1057 (10th Cir. 1976) involved *pro se* complaints by prisoners at the Wyoming State Penitentiary that prison officials acted to restrict their practice of the Satanic religion, in violation of the First Amendment. The district court dismissed the case before any responsive pleading. The 10th Circuit reversed saying:

> "It is true that overt acts prompted by religious beliefs or principles are subject to some regulation . . . and the circumstance of imprisonment is, of course, a factor that bears on the lawfulness of limitations. . . . While in custody inmates have only such rights in practice of their religion as can be exercised without impairing requirements of prison discipline. . . . Again, however, the dismissal was made before there was any assertion by defendants that their actions were taken as necessary security or control measures in the prison, and without any pleading or proof of the surrounding circumstances.
>
> "We are persuaded that the asserted justification of such restrictions on religious practices based on the State's interest in maintaining order and discipline must be shown to outweigh the inmates' First Amendment rights. . . . Hence we conclude we must vacate the judgment of dismissal and remand for further proceedings. If it is determined that the practice of a religious belief is involved, and that there are restrictions imposed on its exercise, then the court should further determine whether any incidental burden on fundamental First Amendment rights is justified by a compelling state interest in the regulation of prison affairs, within the State's constitutional power. . . . For '. . . only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.' *Wisconsin* v. *Yoder*, 406 U.S. 205, 215, 92 S. Ct. 1526, 1533, 32 L. Ed. 2d 15." (540 F. 2d at 1061.)

It may well be that there are compelling state interests which justify the restrictions imposed and that there are no less restrictive methods of achieving the goals of the regulation that all male inmates will be clean shaven of beards, whether those interests serve the purpose of identification or hygiene or whatever. But we are convinced that such restrictions are not to be imposed so as to deny the free exercise of an established religious faith without a proper determination of compelling state interests in doing so, and without the further determination that there are no less restrictive methods of achieving the object of the regulation. Only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion. Although not clearly shown by the record, it appears that it was not until January 15, 1977, that such a regulation was put into effect. Whether it is justified where First Amendment rights are involved is a matter for an evidentiary hearing.

The issue here involved, although not always in the religious context, was considered and the regulation upheld in *Winsby* v. *Walsh*, 321 F. Supp. 523 (C.D. Cal. 1971); *Williams* v. *Batton*, 342 F. Supp. 1110 (E.D.N.C. 1972); *Rinehart* v. *Brewer*, 360 F. Supp. 105 (S.D. Iowa 1973); and *Collins* v. *Haga*, 373 F. Supp. 923 (W.D. Va. 1974). In the following cases the regulations were found invalid when weighed against religious claims by the prisoners involved: *Teterud* v. *Gillman*, 385 F. Supp. 153 (S.D. Iowa 1974), aff'd *sub nom Teterud* v. *Burns*, 522 F. 2d 357 (8th Cir. 1975); *Monroe* v. *Bombard*, 422 F. Supp. 211 (S.D.N.Y. 1976). See also, *Ortiz* v. *Ward*, 384 N.Y.S. 2d 960, 87 Misc. 2d 307 (Sup. Ct. 1976).

We conclude that the orders of dismissal entered in these cases must be vacated and these matters remanded to the trial court for further proceedings in conformity herewith.

APPENDIX C

IN THE
COURT OF APPEALS OF THE STATE OF KANSAS

No. 48,911
and
No. 48,992

Jack L. Wright, Appellant,

v.

Mr. R. R. Raines, Secretary of Corrections,
Appellees,

v.

Kenneth Childers, Appellant,

v.

R. R. Raines, Secretary of Corrections,
Appellees.

You are hereby notified of the following action taken in the above entitled case: Motion by Appellees for Rehearing is DENIED.

Yours very truly,

LEWIS C. CARTER
Clerk, Court of Appeals

Date August 4, 1977

APPENDIX D

IN THE
SUPREME COURT OF THE STATE OF KANSAS

No. 48,911
and
No. 48,992

JACK L. WRIGHT,
Appellant,

v.

MR. R. R. RAINES, Secretary of Corrections,
MR. K. G. OLIVER, Director of Kansas State Penitentiary,
LT. K. LYNCH, et. al.,
Appellees

and

KENNETH CHILDERS,
Appellant,

v.

R. R. RAINES, Secretary of Corrections,
K. G. OLIVER, Director of Kansas State Penitentiary,
LT. KENNETH LYNCH, et al.,
Appellees

ORDER DENYING REVIEW

The petition for review of the opinion of the Court of Appeals filed July 22, 1977, in the above captioned case, is considered and denied, opinion approved.

Dated September 12, 1977.

THE SUPREME COURT OF KANSAS
For the Court
/s/ Alfred G. Schroeder
Justice

A true copy ATTEST:
/s/ Lewis C. Carter
Clerk Supreme Court